PD-1211-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/4/2021 11:22 AM
Accepted 1/5/2021 9:39 AM
DEANA WILLIAMSON
CLERK

NO. PD–1211 –20

FILED
COURT OF CRIMINAL APPEALS
1/5/2021
DEANA WILLIAMSON, CLERK

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

NATHANIEL ALLAN JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Appeal from No. 09-19-00097-CR
In the Court of Appeals
Ninth District of Texas
at Beaumont

PETITIONER NATHANIEL ALLAN JOHNSON'S PETITION FOR DISCRETIONARY REVIEW

LAW OFFICE OF JON A. JAWORSKI

Jon A. Jaworski
State Bar. No. 10592900
1313 Campbell Road Suite E
Houston, Texas 77055
Telephone: 713-688-5885
Fax: 713-956-8619
Email: jaaws@peoplepc.com

ATTORNEY FOR PETITIONER,
NATHANIEL ALLAN JOHNSON

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

I. Honorable Phil Grant, Judge Presiding
9th Judicial District Court of Montgomery County, Texas

II. Nathaniel Allan Johnson, Petitioner (Appellant below)

Jon A. Jaworski, trial and appellate counsel for Petitioner
1313 Campbell Road, Suite E
Houston, Texas 77055

III. The State of Texas, Respondent (Appellee below)

William J. Delmore III, appellate counsel for Respondent
Echo Hutson, trial counsel for Respondent
Raphael Ortega, trial co-counsel for Respondent
Montgomery County District Attorney's Office
207 W. Phillips, 2nd Floor
Conroe, Texas 77301

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Consequently,

A. Petitioner was entitled to a directed verdict; and

B. Petitioner's objections to the § 22.01(b)(2)(A) jury charge were erroneously denied.

II. The Beaumont Court of Appeals erred in finding that Petitioner was not entitled to a jury charge on the lesser-included offense of misdemeanor family assault.

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NO. PD–1211–20

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

NATHANIEL ALLAN JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

Petitioner Nathaniel Allan Johnson, proceeding through counsel, files this his Petition for Discretionary Review and respectfully shows the following.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner does not request oral argument unless the Court believes it would aid consideration of the issues.

STATEMENT OF THE CASE

Petitioner was convicted on March 21, 2019, of felony assault against a family member, enhanced by two prior convictions. 4 R.R. 5–56; 81; 84–85. Punishment was assessed at life incarceration. 4 R.R. 81; 84–85. Petitioner gave timely notice of appeal on March 21, 2019. 4 R.R. 85.

STATEMENT OF PROCEDURAL HISTORY

The Ninth Court of Appeals of Beaumont issued its opinion affirming Petitioner's conviction on November 25, 2020. No motion for rehearing was filed.

On December 17, 2020, the Court granted Petitioner's motion for an extension of time to file a petition for discretionary review, and ordered the petition filed by January 27, 2021. Accordingly, this petition is timely filed.

ISSUES FOR REVIEW

I. The Beaumont Court of Appeals erred in finding the evidence legally sufficient to prove Petitioner had a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A).

Consequently,

A. Petitioner was entitled to a directed verdict; and

B. Petitioner's objections to the section 22.01(b)(2)(A) jury charge were erroneously denied.

II. The Beaumont Court of Appeals erred in finding that Petitioner was not entitled to a jury charge on the lesser-included offense of misdemeanor assault.

ARGUMENT

I.

The Beaumont Court of Appeals erred in finding the evidence legally sufficient to prove Petitioner had a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A).

Petitioner was charged under Texas Penal Code § 22.01(b)(2)(A) with third-degree felony assault involving family violence with a prior conviction for family violence. Proof of a qualifying prior conviction for family violence was an element of the charged offense, and not an enhancement paragraph. *See Calton v. State*, 176 S.W.3d 231, 233–34 (Tex. Crim. App. 2005) (holding proof of prior conviction for evading arrest is an element of third-degree felony evading arrest and must be proven at guilt phase of trial). Under Texas Penal Code § 22.01(f)(2), "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." TEX. PENAL CODE § 22.01(f)(2).

Thus, the State had the burden to prove beyond a reasonable doubt that Petitioner had either

(1) a prior Texas conviction for an offense under Texas Penal Code Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 against a person whose relationship to or association with him

was described by Texas Family Code Section 71.003, 71.005, or 71.0021 (b),

or

(2) a prior conviction from another state for an offense containing elements substantially similar to the elements of those Texas Penal Code sections or subsections.

The State did not allege that Petitioner had a prior Texas conviction meeting the requirements of section 22.01(b)(2)(A). Instead, the State claimed that Petitioner had a prior conviction in Arkansas in 2009 for "battery in the third-degree domestic" that qualified under the provisions of section 22.01(f)(2).

Thus, the State was required to prove beyond a reasonable doubt with legally sufficient evidence during the guilt-innocence phase of trial that (1) Petitioner committed the underlying Texas assault offense by impeding complainant Rhonda's normal breathing, and (2) that Petitioner was previously convicted in Arkansas in 2009 for an offense containing elements substantially similar to the elements of those subsections listed for purposes of section 22.01(b)(2)(A). *See Flowers v. State*, 220 S.W.3d 919, 921–22 (Tex. Crim. App. 2007). This, the State completely failed to do.

The State introduced into evidence State's Exhibit #11, which it represented to the trial court as a "self-authenticating, certified judgment" from the state of Arkansas against Petitioner for third-degree domestic battery in 2009. 2 R.R. 280–01. The trial court itself was hesitant, and noted on the record that the exhibit "looks like a docket sheet, not a judgment." *Id.*

In attempting to prove up the Arkansas event as a "qualifying conviction" for purposes of section 22.01(b)(2)(A), the State presented Randal Gilbert from the Union County Sheriff's Department in Arkansas. Unfortunately for the State, Gilbert testified under cross-examination that Exhibit #11 was a case docket sheet, and *not* a judgment. *Id.* at 283, 285.

Moreover, Gilbert had no knowledge or familiarity with the relevant Texas code sections for purposes of meeting the requirements of section 22.01(f)(2):

> Q. Okay. And are you familiar with the Texas law penal code regarding domestic violence?
>
> A. No, I am not.
>
> Q. Are you familiar with the family code Section 21.11, 20.04, 20.03, and Chapter 22 and Chapter 19 of the Texas Penal Code is?
>
> A. No, I'm not.
>
> Q. Do you have any idea what the requirements of that are?
>
> A. No, I have no clue.

Id. at 286.

Neither Gilbert nor any other witness provided legally sufficient evidence to prove that Petitioner was previously convicted in Texas of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Penal Code, against a person whose relationship to or association with Petitioner was described by Section 71.003, 71.005, or 71.0021 (b) of the Family Code, as required by section 22.01(b)(2)(A). Nor did the State utilize Texas Penal Code § 22.01(f)(2) to prove that the Arkansas criminal event substantially met the requirements for a qualifying Texas conviction under section 22.01(b)(2)(A).

In short, there was absolutely no evidence that the 2009 Arkansas "battery in third-degree domestic" event was the equivalent of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Texas Penal Code against a person whose relationship to or association with Petitioner was described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.[1]

---

[1]The trial court acknowledged on the record that it may have erred in allowing in evidence of the Arkansas event:

> Now that I know the level of proof that they had to bring – or the quality of proof that they had to bring in that Arkansas case, I may have disallowed them going into that. But unfortunately at this point I've let them go into it. I've let her arraign this jury on that jurisdictional paragraph, so now that bell has been rung that he's got a prior conviction.

Id. at 7. Ultimately, however, the trial court was of the opinion that the State had "provided *a scintilla* of evidence" and allowed the trial to go forward. *Id.* at 117 (emphasis added).

In denying these arguments, the Beaumont Court of Appeals held as follows:

> Here, the State introduced the certified docket sheet noting that Johnson pleaded guilty to Battery 3rd Degree Domestic, and two witnesses testified to personal knowledge of Johnson's arrest and conviction for the charge. For purposes of the relevant sections of the statute, "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." TEX. PENAL CODE ANN. § 22.01(f)(2). Viewing all the evidence in the light most favorable to the verdict and after reviewing all the evidence and considering all reasonable inferences therefrom, we conclude that a rational fact-finder could have found the elements of the offense beyond a reasonable doubt.
>
> Because we have concluded that the evidence presented at trial was sufficient under *Jackson v. Virginia* to support the jury's verdict, we overrule Appellant's issue challenging the trial court's denial of Appellant's motion for directed verdict. *See Smith*, 499 S.W.3d at 6; *Williams*, 937 S.W.2d at 482. Also, because we have determined that a rational fact-finder could have found the prior conviction beyond a reasonable doubt, the trial court did not err in overruling Johnson's objection to the inclusion of the portions of the jury charge referencing Johnson's prior conviction.

Johnson, Mem. Op. at 20–21.

Conspicuously absent from the Beaumont court's opinion is any analysis of evidence establishing that "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." That is, the Beaumont court did not discuss whether the 2009 Arkansas "Battery 3rd Degree Domestic" event contained elements substantially similar to the elements

of the Texas offenses listed in the relevant sections or subsections. With no analysis or identification whatsoever of any evidence or relevant legal provisions, the Beaumont court inexplicably found that "a rational fact-finder could have found the prior conviction beyond a reasonable doubt[.]" This is not only erroneous but incredible, given that no evidence appears in the record upon which a rational fact-finder could have based such a finding.

The evidence is insufficient – indeed, there is *no* evidence – to support an express or implied finding of a qualifying prior conviction for purposes of section 22.01(b)(2)(A), or that the 2009 Arkansas "battery in third-degree domestic" was a qualifying non-Texas conviction under section 22.01(f)(2). Accordingly, the Beaumont Court of Appeals erred in affirming the conviction and the conviction should be reversed.

I. A

Petitioner was entitled to a directed verdict

The State failed to present legally sufficient evidence that Petitioner had a prior conviction for, or that the purported 2009 Arkansas conviction was statutorily equivalent to, an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Texas Penal Code against a person whose

relationship to or association with him was described by Section 71.003, 71.005, or 71.0021 (b) of the Texas Family Code.

Defense counsel re-urged these objections in a motion for directed verdict at the close of the State's evidence. 3 R.R. 165–66 (emphasis added). The motion was denied. *Id.* at 166.

A directed verdict at the close of the State's case challenges the sufficiency of the State's evidence to prove its case. As shown above, the State failed to meet its burden of proving Petitioner had a prior Texas conviction meeting the specifications of section 22.01(b)(2)(A) or a non-Texas conviction that qualified under section 22.01(f)(2). Consequently, Petitioner's motion for a directed verdict should have been granted.

I. B

Petitioner's objections to the § 22.01(b)(2)(A) jury charge were erroneously denied.

Moreover, the State was not entitled to a jury charge regarding an alleged offense under section 22.01(b)(2)(A) because it failed to prove that Petitioner had a prior conviction meeting the specifications of section 22.01(b)(2)(A) or that qualified under section 22.01(f)(2). Consequently, the State did not present evidence warranting a jury charge for felony assault family violence, and Petitioner's objection to the jury charge should have been granted.

II.

The Beaumont Court of Appeals erred in finding that Petitioner was not entitled to a jury charge on the lesser-included offense of misdemeanor assault.

A trial court has a duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. *See* TEX. CODE CRIM. PROC. art. 36.14. Analysis of an alleged jury charge error requires consideration of whether error existed in the charge, and if so, whether sufficient harm resulted from the error to compel reversal. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

This Court employs a two-part analysis to determine whether a trial court abused its discretion in denying a requested charge on a lesser-included offense, which is the precise error alleged by Petitioner. *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018); *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *see also* TEX. CODE CRIM. PROC. art. 37.09 (defining the requirements for a lesser-included offense). The Beaumont Court of Appeals agreed that misdemeanor family assault was a lesser-included offense in Petitioner's case; the court believed he was not entitled to the charge.[2]

---

[2]If the Court agrees in this proceeding that the State failed to prove Petitioner had a prior qualifying conviction for purposes of section 22.01(b)(2)(A), then the conviction must be reversed. The lesser-included jury charge issue would then be moot.

The Court then reviews the entirety of the record to determine if there exists "more than a scintilla" of affirmative evidence, regardless of whether controverted or credible, from which a rational jury could find the defendant guilty of only the lesser offense. *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017); *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012) ("While it is true that the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if Appellant is guilty, he is guilty only of the lesser-included offense."). This requirement is met if

> there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense.

Ritcherson, 568 S.W.3d at 671.

The evidence entitled Petitioner to a lesser included jury charge for misdemeanor family assault under *Ritcherson*. Eyewitness Erin had been at Rhonda's house with her friend, Rhonda's daughter Amy, and overheard Rhonda and Petitioner arguing and yelling in Rhonda's room. When they heard Rhonda scream at one point, they ran to Rhonda's room to investigate. Erin testified that she saw the following:

A. I remember seeing [Rhonda] on the bed face down and [Petitioner] on top of her.

Q. Okay. And what was going on? What was [Petitioner] doing?

A. He was pulling her head into a pillow.

2 R.R. 264.

Q. Okay. What was [Rhonda] doing?

A. She was trying to get her head up because she was yelling to, like, take [her son] out of the room.

Q. Okay. Was she yelling for help?

A. Yes, ma'am.

Id. at 265.

Q. Okay. So [Amy] started hitting [Petitioner] with the blue dog bowl. And [Rhonda] was face down, and they were on the bed and [Petitioner] was on top of her.

Did you see what happened next between [them]?

A. [Petitioner] got up afterwards, and he grabbed his keys and cigarettes and left.

Id. at 267.

Erin did not testify that Petitioner was impeding Rhonda's breathing during the incident, and her testimony implies, and creates a reasonable inference, that Rhonda's breathing was *not* being impeded. Nevertheless, the trial court denied

Petitioner's request for a lesser-included jury charge for misdemeanor family assault. 3 R.R. 174.

The San Antonio Court of Appeals recently reversed a jury conviction of felony assault involving family violence by impeding breathing (occlusion) because the trial court denied the defendant a lesser included jury charge for misdemeanor family assault. In a case substantially similar to the instant appeal, the court in *Ortiz v. State*, 2019 WL 4280074 (Tex. App. – San Antonio, Sept. 11, 2019, pet. granted), held that misdemeanor assault under section 22.01 was a lesser included offense to felony family assault by impeding breathing under section 22.01(b)(2)(B):

> Section 22.01 of the Texas Penal Code describes assault family violence by occlusion as assault with two additional requirements—that it be committed against a family member and be committed by occlusion. *Hardeman v. State*, 556 S.W.3d 916, 921 (Tex. App.—Eastland 2018, pet. ref'd); *see also* TEX. PENAL CODE ANN. § 22.01(b)(2)(B). Accordingly, simple assault is a lesser included offense because it is included within the proof necessary to establish assault family violence by strangulation. *Hardeman*, 556 S.W.3d 921.

Ortiz, at *3 (footnotes, quotation marks omitted). The San Antonio court noted that the jury could have found that the defendant caused bodily injury to the complainant, but did not choke her, by believing portions of the testimony presented at trial while disbelieving other portions. The court concluded that there

was evidence from which a rational jury could find the defendant guilty of only the lesser offense. *See Hardeman v. State*, 556 S.W.3d 916, 922–23 (Tex. App.—Eastland 2018, pet. ref'd) (holding trial court erred in denying lesser offense of assault where the jury could have rationally believed testimony that the defendant did not choke the victim but also believed he caused bodily injury to the victim through testimony establishing he grabbed her in some manner during an argument).

In its decision affirming Petitioner's conviction, the Beaumont Court of Appeals held that *Ortiz* required direct, affirmative evidence that Rhonda's breathing was not impaired; only then would Petitioner have been entitled to the lesser-included jury charge. However, the Beaumont Court gave *Ortiz* a more narrow construction than appears in the decision itself. Moreover, the Beaumont court's holding is at odds with *Hardeman*.

The trial court's error in refusing the requested lesser-included charge constitutes reversible error. If, as here, the absence of a charge on the lesser included offense left the jury with the sole option either to convict the defendant of the greater offense or to acquit him, some harm exists. *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995). If "some harm" exists, then the error requires reversal of the conviction. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.

Crim. App. 1985) (op. on reh'g); *Braughton v. State*, 569 S.W.3d 592, 613 (Tex. Crim. App. 2018).

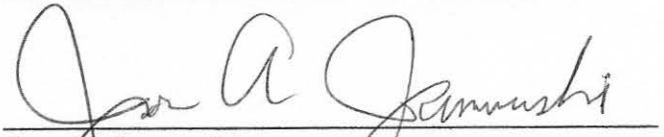
Because the trial court's erroneous denial of Petitioner's requested lesser-included offense charge caused him some harm, the judgment of conviction must be set aside.

PRAYER FOR RELIEF

Petitioner Nathaniel Allan Johnson prays that the Court grant discretionary review, and following review, reverse the conviction and remand the case for new trial, or order such relief as the Court may deem appropriate.

Respectfully submitted,

LAW OFFICE OF JON A. JAWORSKI

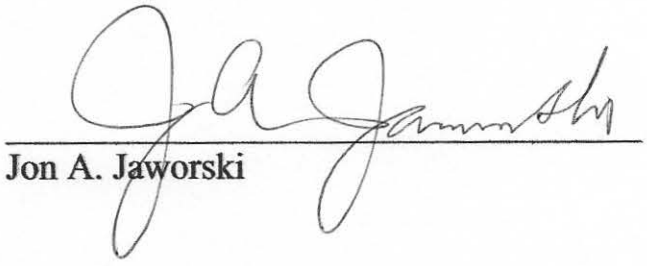


Jon A. Jaworski
State Bar. No. 10592900
1313 Campbell Road Suite E
Houston, Texas 77055
Telephone: 713-688-5885
Fax: 713-956-8619
Email: jaaws@peoplepc.com

ATTORNEY FOR PETITIONER,
NATHANIEL ALLAN JOHNSON

CERTIFICATE OF COMPLIANCE

Pursuant to TRAP Rule 9.4, I hereby certify that this Petition for Discretionary Review was prepared using WordPerfect 2020 with fourteen-point font, and twelve-point font for any footnotes, in Times New Roman typeface font. Omitting the portions not included for the word limit, this petition contains 3,187 words as calculated by the WordPerfect 2020 program.



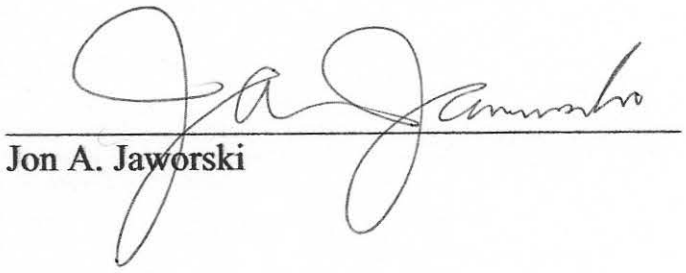
Jon A. Jaworski

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner Nathaniel Allan Johnson's Petition for Discretionary Review has been served upon the following counsel of record in accordance with the Texas Rules of Appellate Procedure on this the 31ST day of December, 2020, via certified mail, return receipt requested:

Counsel for respondent State of Texas:

William J. Delmore III
Montgomery County District Attorney's Office
207 W. Phillips, 2nd Floor
Conroe, Texas 77301



Jon A. Jaworski

Electronically filed with:

Court of Criminal of Appeals–

The Hon. Abel Acosta, Clerk of Court
Court of Criminal of Appeals
Supreme Court Building
P.O. Box 12308
Austin, TX 78711

APPENDIX

Nathaniel Allan Johnson v. State of Texas, No. 09-19-00097-CR
(Tex. App. – Beaumont November 25, 2020)

In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-19-00097-CR

NATHANIEL ALLAN JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 18-10-14374-CR

MEMORANDUM OPINION

In five appellate issues, Nathaniel Johnson appeals his conviction for second-degree felony assault of a family member by impeding breath, enhanced by two felony convictions. See Tex. Penal Code Ann. § 22.01(b-1) (current version at Tex. Penal Code Ann. § 22.01(b-3)) (FTN 1: We cite to the statutory section of the version of Section 22.01 in effect at the time Johnson was indicted and convicted.) A grand jury indicted Johnson alleging that

> . . . on or about May 27, 2018, and before the presentment of this indictment, . . . did intentionally, knowingly or recklessly cause bodily injury to [Rhonda] (FTN 2: We use aliases to refer to victims and child witnesses. *See* TEX. CONST. art. I, § 30(a)(1) (granting crime victims "the right to be treated with fairness and with respect for the

victim's dignity and privacy throughout the criminal justice process"), a member of the defendant's family or a member of the defendant's household or a person with whom the defendant has or has had a dating relationship, as described by Section 71.003 or 71.005 or 71.0021(b), Family Code, by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of [Rhonda], by applying pressure to [Rhonda]'s throat or neck or blocking [Rhonda]'s nose or mouth,

And it is further presented in and to said Court, that before the commission of the offense alleged above, the defendant had previously been convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04, or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005 or 71.0021(b) of the Family Code,

Enhancement Paragraph A

And the grand jury further presents that said Defendant, Nathaniel Allan Johnson, was convicted of a felony, to wit: Burglary of Habitation with Intent to Commit Theft on September 30, 2004 in the 338th District Court of Harris County, Texas in Cause No. 989985 under the name of Nathaniel Allen Johnson and said conviction became final prior to the commission of the aforesaid offense in Count I of this Indictment.

Enhancement Paragraph B

And the Grand Jury further presents that said Defendant, Nathaniel Allan Johnson, was convicted of a felony, to wit: Robbery on May 31, 1995 in the 174th District Court of Harris County, Texas in Cause No. 9412248 under the name of Nathaniel Allen Johnson and said conviction became final prior to the commission of the aforesaid offense in Count I and Enhancement Paragraph A of this Indictment.

A jury found Nathaniel Johnson guilty of second-degree felony assault against a against a family member. Johnson pleaded true to the enhancement

paragraphs alleged in the indictment, and the jury assessed punishment at life in prison. Finding no reversible error, we affirm.

Evidence at Trial

Sergeant Billy McPike with the Conroe Police Department testified that on May 27, 2018, he received a domestic disturbance call, and he received information that the suspect had left the scene in a black Dodge pickup after the incident had occurred. Another officer had stopped Johnson in the identified pickup by the time McPike arrived. According to Sergeant McPike, when he asked Johnson about what had happened, Johnson "was insistent that he didn't really have much to say, go ask her, she's the one that called."

McPike testified he went to the residence where the disturbance occurred and he spoke with the victim, Rhonda. According to Sergeant McPike, Rhonda had tears on her face, she was clearly distraught, and she "would speak for a few words and then take a deep breath as if something difficult had just occurred with her, something emotional, something traumatic." Sergeant McPike testified that Rhonda told him that earlier that day she had been trying to rest because she had to work the night shift that evening and the defendant was at the house visiting their three-year-old child and supervising two other children. According to Sergeant McPike, Rhonda said she was unable to get rest because of noise in the house, and she and Johnson had an argument because she was upset that Johnson had not kept

the children quiet or out of her bedroom. Rhonda told him that after a verbal argument, Johnson grabbed one of her arms, twisted it behind her back and pushed her face down into a pillow on the bed in one of the bedrooms. According to Sergeant McPike, Rhonda reported that this caused her to be unable to breathe. Sergeant McPike testified that although Rhonda reported to him that she was in pain, she refused an ambulance. But, he noticed redness and swelling on the right side of her face, and her lower right arm was red with what appeared to be "maybe some finger marks[.]" Sergeant McPike then radioed to the officer that was with Johnson to go ahead and detain Johnson for assault. Sergeant McPike photographed Rhonda's injuries and obtained her statement, and then Officers Taylor and Lupnitz arrived on the scene to continue the investigation. A recording from Sergeant McPike's body camera from that evening was admitted into evidence and published to the jury. Sergeant McPike testified that the bodycam recording portrayed his first conversation with Rhonda but not their second conversation five or ten minutes later when Rhonda reported that she was in pain and had been unable to breathe. Photographs of Rhonda's injuries were also admitted and published to the jury. At trial, Sergeant McPike testified that the photographs showed that the right side of Rhonda's face was "slightly reddened and swollen, and also she was still crying from the incident." According to

Sergeant McPike, the photographs showed the redness on her chin and neck that Rhonda reported was caused by Johnson "shoving her face down into the pillow."

Sergeant McPike testified that later during the investigation, Johnson was sitting in a patrol car parked in front of the house and Johnson was angry, upset, and was "kicking and thrashing around[, and] [m]aking a lot of noise, attempting to distract the officers doing their investigation." According to Sergeant McPike, he initially told Officer Taylor to arrest Johnson for assault, but then McPike determined that assault by strangulation occurred because "[a]pparently [Johnson] pushed [Rhonda's] face down into the pillow which was on top of a bed with such force that she wasn't able to breathe normally." Sergeant McPike acknowledged that when he first arrived, he did not look to see whether Johnson had any injuries and he did not ask Rhonda whether she did anything to Johnson prior to what Rhonda alleged happened.

Officer Tyson Taylor with the Conroe Police Department testified that he was the primary officer at the scene and his training officer, Officer Lupnitz, was with him. Officer Taylor testified that he was dispatched to look for a white male in a black Dodge truck who was leaving the address where the incident occurred, and he stopped the truck. The driver, Johnson, confirmed he was coming from the address in question and that he had been drinking and driving. According to Officer Taylor, Johnson said he "was having an argument with his girl[]" about her

trying to sleep and left "before the police could arrive." Officer Taylor testified that Johnson "verified that he was involved but didn't want to give any details about anything."

Officers Taylor and Lupnitz went to the residence where the incident occurred and met with Rhonda who appeared to be exhausted, frightened, and crying. According to Officer Taylor, Rhonda told him that she and Johnson were on the bed, he had been drinking and was being loud and playing with their child, they had an argument about her not having time to sleep, he cursed and yelled at her and threatened to kick her and punch her. Rhonda told Officer Taylor that Johnson pulled her off the bed onto the floor, twisted her arm behind her back until her wrist and shoulder popped, threw her on the bed with her face down in her pillow, shoved her face into the pillow with his hand behind her head, she "was trying to suck in air but could only suck in her pillow[,]" she could not breathe, and she thought she might pass out or die. Rhonda told Officer Taylor that her daughter, Amy, came in while Rhonda had her face in the pillow and her daughter began hitting Johnson in the legs and the back with a blue plastic bowl. Officer Taylor noticed Rhonda had redness on her face and to the right side of her neck. Officer Taylor testified that there were calls to 911 by Amy and Johnson. Rhonda complained of pain in her face, arm, rib, and shoulder and said that she sustained scratches to her face "when she was trying to fight to be able to breathe," that the

pain in her shoulder and wrist was from when he twisted her arm back until they both popped, and that the pain in her rib was from when he put his knee into her rib as he was applying pressure to her head and putting her face into the pillow.

According to Officer Taylor, while he was speaking with Rhonda, Johnson was in the patrol car yelling, screaming, banging his head until he bled from the forehead, and Johnson repeatedly kicked the door. Officer Taylor testified that he had to go over to the patrol car and tell Johnson to stop, but Johnson repeated the behavior after the officer left.

Officer Taylor testified that Rhonda told him she would go to the hospital later but could not go at that time because she had no one to watch the children. Recordings of Officer Taylor's bodycam and his patrol car camera were admitted into evidence and published to the jury. According to Officer Taylor, Rhonda's daughter, Amy, was forthcoming with information. After he spoke to Amy out of her mother's presence, he contacted the assistant district attorney and determined that Johnson would be arrested on assault family violence strangulation.

Rhonda testified that she had a four-year-old son with Johnson and a thirteen-year-old daughter, Amy. Rhonda referred to Johnson as her "spouse" even though she agreed they are not legally married. Rhonda stated that they had lived together for a long time and had been in a relationship for more than six years.

According to Rhonda, on the day of the incident, she, Johnson, her daughter, son, and her daughter's friend were at the house, and Rhonda needed to get sleep prior to going to work that night. Rhonda testified that she and Johnson had an argument about spending $40 on a new dog instead of bills, and then when she was trying to sleep, he and their son kept coming in and out of the bedroom, which caused her to become angry and yell. She testified she was also angry because he had been drinking that day and he had been sober for six years. Rhonda testified she took the $40, he was trying to get it from her, and they were yelling while their son was in the bedroom with them and the girls were in the living room. Rhonda testified that Amy called 911 because she was scared because there was screaming, the door was shut, and Johnson had been drinking. Rhonda testified that Johnson also then called 911, and when 911 called back, he was walking out the door and she told the dispatcher that Johnson assaulted her. According to Rhonda, she told 911 that Johnson had assaulted her even though there had been no physical altercation because she was mad that Johnson had started drinking again. Rhonda testified that she lied on the 911 call when she said that Johnson was beating her and that he messed up her shoulder and arm. Rhonda testified that when the police arrived, she lied when she told them that he pulled her off the bed, twisted her wrist and shoulder until they popped, scratched her face, threw her on the bed, and smashed her face into the pillow where she could not breathe, that Amy hit

Johnson with the dog bowl, and that she had pain in her shoulder, arm, face or wrist. Rhonda testified that she scratched her own neck, Amy did not come into the bedroom at any point during the argument, and she did not know if Amy hit Johnson with something or not. Rhonda testified that she lied in her statement when she stated the same version of events that she gave the police and that she lied when she said in her statement that Johnson called 911 from his phone so they could hear her die. Rhonda admitted driving herself to the hospital later that day and told the hospital personnel that she had pain in her arm and shoulder, her right arm was pulled behind her back, and she had been held down and kneed in the ribs. Rhonda also testified that she lied when she reported to CPS and to the District Attorney's Office the same version of events that she told the officers and included in her statement. Rhonda testified that Johnson called her the next day from jail, that she was not scared of Johnson coming back to the house after the incident although she told multiple people otherwise, that she did not want to testify at trial and only did so because she was subpoenaed, and she did not want Johnson prosecuted for something he did not do.

Officer Lupnitz testified that his bodycam video was working that day and that it recorded Rhonda as she told Lupnitz how Johnson pulled her arm behind her back and pushed her face into the pillow so that she could not breathe. The bodycam video was admitted into evidence and published to the jury. Officer

Lupnitz testified that Johnson told him that he and Rhonda had been in a relationship for a long period of time.

Amy, Rhonda's thirteen-year-old daughter, testified that on the day of the incident she was at the house with her mom and Johnson, along with her little brother, and her friend, Erin. According to Amy, her mother and Johnson argued for a couple of hours about getting a new dog. Amy testified that Johnson started drinking alcohol during the argument, which took place back and forth between the living room and the bedroom. According to Amy, at one point she was in the living room and her mother and Johnson were in the bedroom with the door closed and she heard yelling that scared her. Amy told the jury that she called 911 because she was scared, and she did not know what was happening. Amy testified that while she was on the phone with 911, the bedroom door opened, and Johnson grabbed his stuff and left while her mother stayed in the bedroom. At trial, Amy said she never saw Johnson physically attack her mother, never saw him push her mother's head into a pillow, never heard her mother tell her to call 911, and never picked up a dog bowl and hit Johnson with it. Amy admitted that she remembered telling the police that her mother told her to call 911, and that she told the police that she saw Johnson with his hand on the back of her mother's head and shoving her face into a pillow, and she had told them that she hit Johnson in the legs and back with the blue plastic dog bowl, but at trial she said that those were all lies she

told the police. Amy agreed that a week or so after the incident she went to Children's Safe Harbor and talked to an interviewer about the incident and that she told the interviewer the same things she had told the police on the night of the incident. But, Amy testified at trial that she had lied to the interviewer when she told the interviewer that she saw Johnson's whole body on top of her mother using his hands and arms to shove her mother's face into the pillow and when she said her mother's face was red and her mother sounded scared to death and was screaming, "Call 911." Amy said she had also lied about hitting Johnson with the plastic bowl and him trying to get the phone from her. Amy testified that since Johnson's arrest, her mother has taken her and her brother approximately every week to visit with Johnson in jail.

Thirteen-year-old Erin, Amy's friend, testified that her mother worked with Amy's mother and that she had known Amy about five years and been to their house often. Erin testified that she was at Amy's house on the day of the incident, that Rhonda and Johnson had been arguing that day and that the argument progressed in the bedroom while Erin and Amy were in the living room. According to Erin, the bedroom door was closed and then Rhonda came out and told the girls that if Johnson left the room that they would have to call 911. Erin testified that Rhonda went back into the room, they heard her scream, Amy and Erin went into the room. Erin testified that she saw Rhonda on the bed face down

with Johnson on top of Rhonda and pushing her head into a pillow, Johnson looked mad, and Rhonda was crying and trying to yell for help. Erin testified that Amy was behind her, Amy called 911, and Amy started hitting Johnson in the lower back with a dog bowl and yelling at him to get out. Johnson got up, grabbed his keys and cigarettes, and left. Erin testified that Rhonda came out of her room with scratches to her face, was breathing heavily, crying, and complaining of pain in her arm. Erin testified she told the same version of events to an interviewer at Children's Safe Harbor a few days later. According to Erin, the last time she saw Rhonda and Amy, they tried to get her to say something different, and Erin refused to lie. Amy told Erin to change her mind and Amy said she "didn't want [Johnson] to go away forever because he has a kid."

Tiffani Dusang, the administrative director over the emergency room center at Lyndon B. Johnson Hospital and a forensic nurse examiner, testified that she has testified many times as an expert witness in cases involving physical assault and strangulation. According to Dusang, strangulation is "a form of asphyxia which is the lack of oxygen that's characterized by the intentional closure of vessels or air passages in the neck by intentional external pressure." Dusang testified that smothering falls under the definition of strangulation and is a form of breath impediment and is not external pressure on the neck but is "some kind of covering of the air passages of the nose or the mouth so that you impede breath where they

cannot breathe in." Dusang testified that in domestic violence situations it is not uncommon for a victim of strangulation or suffocation to not report to treating medical professionals the suffocation event because "they can now breathe[,]" and they are concerned "more on the pressing matters such as pain[.]" Dusang testified that it is dangerous to impede someone's airflow because it can be lethal or cause neurological problems, seizures, or comas due to the lack of oxygen to the brain. According to Dusang, someone with their breath impeded can feel, among other things, like they are going to pass out or about to die.

Dusang testified she reviewed the medical records in the case and documents related to Rhonda's treatment on May 27, 2018 at Conroe Regional Medical Center. Dusang testified that, based on her review of the records, Rhonda's chief complaint was assault and pain in chest and her right side, upper extremity. According to Dusang, Rhonda told the nurse "that she was assaulted by a partner at 1700, was held down, [and] kneed in the ribs. She reported her right arm was pulled behind her back, and she reported pain to her right hand and shoulder." Dusang testified that the medical records showed that Rhonda presented with elevated heart rate and blood pressure, and she was treated for pain with an anti-inflammatory injection and discharged with a sling and instructions that she could take Motrin and Ibuprofen. According to Dusang, if a person goes into a hospital and is not evaluated properly, a physician can miss signs and symptoms of

a person being suffocated, especially if the victim does not mention the strangulation as part of the assault. Dusang noted the nurse's assessment of Rhonda stated that "Patient reports that she was pulled off the bed by her boyfriend, who then turned her over and threw her on the bed face down, and pulled her arm up by her head and was kneeing her in the ribs. And her 12-year-old daughter is the one who stopped the assault."

A Victim Assistance Coordinator for the Montgomery County District Attorney's Office testified that she met with Rhonda on May 31, 2018, and Rhonda told her that Johnson had suffocated her, and that Rhonda was crying, and said she was frightened. According to the Victim Assistance Coordinator, on another later occasion, Rhonda was very scared on behalf of her children and wanted to obtain a protective order against Johnson, but was scared of obtaining one and "how that could [a]ffect any surrounding circumstances[.]" The Victim Assistance Coordinator testified that she spoke to Rhonda on July 26, 2018, Rhonda informed her that she did not want Johnson prosecuted, and when she spoke to Rhonda on November 26, 2018 about a trial setting, Rhonda mentioned that she did not want to testify.

Dr. David Lawson, a professor at Sam Houston State University in the counseling department and the director for the Center for Research and Clinical Training and Trauma, testified that, in his experience, victims of domestic violence

often recant because they have sympathy for the perpetrator, are pressured by family members, or do not want to take a child away from the parent.

Lieutenant Randal Gilbert with the Union County Sheriff's Department in Arkansas testified that while working for the El Dorado Police Department in 2009 he investigated and arrested Johnson for domestic violence assault in Union County and was able to identify Johnson at trial as the person he arrested in 2009. The trial court admitted State's Exhibit 11, a document titled "Union County District Court Docket Case #: CR-09-1984" for Defendant Nathaniel Allen Johnson in El Dorado, Arkansas which included his date of birth, driver's license number, and social security number. The document listed a 2009 charge for "Chrg#2" of "Battery 3rd Degree Domestic" and noted that Johnson had entered a guilty plea to the charge. Notations on the document state:

09/01/09 PleaFindDispo . . .	In Court (Arraignment On 8/31/09), On Chrg#2 (-Battery 3rd Degree Domestic), Defendant Plead: Guilty. Court Found Defendant: Guilty. Finding Entered.
09/01/09 Order . . .	In Court (Arraignment On 8/31/09), On Chrg#2 (-Battery 3rd Degree Domestic), Court Ordered Defendant To Pay: ($500.00 Of Fine, $100.00 Of Cost, $20.00 Of County Jail Fee, $20.00 Of Jail Booking And Admin Fee) In The Total Amount Of $640.00 With $2

Lieutenant Gilbert testified that he had specific memory of the case independent of State's Exhibit 11 and that the exhibit accurately reflected the case in which he investigated and arrested Johnson. Lieutenant Gilbert testified that he had specific knowledge that the conviction for "Battery 3rd Degree Domestic" reflected on State's Exhibit 11 involved a victim that was a member of Johnson's family, household, or a person with whom he was in a dating relationship.

Barbara testified that she lives in El Dorado, Arkansas and she was in a romantic relationship with Johnson and lived with her daughter and Johnson in El Dorado on May 27, 2009. According to Barbara, the police arrived at her house on that date and arrested Johnson for domestic violence battery.

Appellate Issues

In issues one through four, Johnson argues the State failed to provide legally sufficient evidence to prove the prior conviction (a required element) and therefore also erred in overruling Johnson's motion for directed verdict and objections to the jury charge. In Johnson's fifth issue, he argues the trial court erred in denying Johnson's request for a lesser-included offense of misdemeanor assault in the jury charge.

Standard of Review and Applicable Law

In reviewing the legal sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any

rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The fact-finder is the exclusive judge on the credibility of witnesses and the weight to be given their testimony. *See Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). We give deference to the fact-finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. If the record contains conflicting inferences, we must presume that the fact-finder resolved such facts in favor of the verdict and defer to that resolution. *Brooks v. State*, 323 S.W.3d 893, 899 n.13 (Tex. Crim. App. 2010); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

"A motion for instructed verdict is essentially a trial level challenge to the sufficiency of the evidence." *Smith v. State*, 499 S.W.3d 1, 6 (Tex. Crim. App. 2016). Therefore, "[w]e treat a point of error complaining about a trial court's failure to grant a motion for directed verdict as a challenge to the legal sufficiency of the evidence[,]" and the *Jackson v. Virginia* standard of review applies. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996) (citing *Jackson*, 443 U.S. at 319).

A trial court has a duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14; *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015). Analysis of an alleged jury charge requires consideration of dual inquiries: (1) whether error existed in the charge; and (2) if so, whether sufficient harm resulted from the error to compel reversal. *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (citing *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005)). If we determine no error occurred, our analysis ends. *See Ngo*, 175 S.W.3d at 743-44.

We employ a two-part analysis to determine whether a trial court abused its discretion in denying a requested charge on a lesser-included offense—the alleged error here. *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018); *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *see also* TEX. CODE CRIM. PROC. ANN. art. 37.09 (defining the requirements for a lesser-included offense). We compare the statutory elements as alleged in the indictment with the statutory elements of the requested lesser-included offense to determine whether the lesser-included offense is included within the proof necessary to establish the charged offense. *Ritcherson*, 568 S.W.3d at 670-71; *Bullock*, 509 S.W.3d at 924. And, we review the entirety of the record to determine if there exists "more than a scintilla" of affirmative evidence, regardless of whether controverted or credible,

from which a rational jury could find the defendant guilty of only the lesser offense. *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017); *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012) ("While it is true that the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if Appellant is guilty, he is guilty only of the lesser-included offense."). This requirement is met if:

> there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense.

Ritcherson, 568 S.W.3d at 671 (citing *Saunders v. State*, 840 S.W.2d 390, 391-92 (Tex. Crim. App. 1992)).

Analysis

In Johnson's first four issues, he argues that the State failed to provide legally sufficient evidence to prove that Appellant was "previously convicted of an offense under Chapter 19, Chapter 22, Section 20.03, Section 20.04 or Section 21.11 of the Penal Code, against a person whose relationship to or association with the defendant is described by Section 71.003, 71.005, or 71.0021(b) of the Family Code," and that the trial court erred in overruling Appellant's motion for directed verdict and Appellant's objections to the jury charge. According to Johnson, (1) the plain language of section 22.01(b)(2)(A) requires that the prior conviction for

jurisdictional purposes must be a Texas conviction meeting the statute's requirements and the State only introduced evidence of an Arkansas offense; (2) State's Exhibit 11 was insufficient as a judgment of conviction; and (3) the State did not establish that the Arkansas offense met the requirements for a qualifying conviction under the statute.

On appeal, Johnson does not argue the trial court improperly admitted the docket sheet into evidence but instead he challenges the legal sufficiency of the evidence to prove the prior conviction. Section 22.01 does not require a judgment of conviction to prove the prior conviction. *See generally Beck v. State*, 719 S.W.2d 205, 209 (Tex. Crim. App. 1986) (discussing various ways to prove a prior conviction). Furthermore, to establish a prior conviction for purposes of enhancement, the State must show the existence of a prior conviction and the defendant's link to that conviction. *Brown v. State*, 508 S.W.3d 453, 456 (Tex. App.—Fort Worth 2015, pet. ref'd) (citing *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007)). The trier of fact weighs the credibility of each piece of evidence and determines whether the totality of the evidence establishes the existence of the alleged conviction and its link to the defendant beyond a reasonable doubt. *See id.* (citing *Flowers*, 220 S.W.3d at 923). Here, the State introduced the certified docket sheet noting that Johnson pleaded guilty to Battery 3rd Degree Domestic, and two witnesses testified to personal knowledge of

Johnson's arrest and conviction for the charge. For purposes of the relevant sections of the statute, "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." TEX. PENAL CODE ANN. § 22.01(f)(2). Viewing all the evidence in the light most favorable to the verdict and after reviewing all the evidence and considering all reasonable inferences therefrom, we conclude that a rational fact-finder could have found the elements of the offense beyond a reasonable doubt.

Because we have concluded that the evidence presented at trial was sufficient under *Jackson v. Virginia* to support the jury's verdict, we overrule Appellant's issue challenging the trial court's denial of Appellant's motion for directed verdict. *See Smith*, 499 S.W.3d at 6; *Williams*, 937 S.W.2d at 482. Also, because we have determined that a rational fact-finder could have found the prior conviction beyond a reasonable doubt, the trial court did not err in overruling Johnson's objection to the inclusion of the portions of the jury charge referencing Johnson's prior conviction. We overrule issues one through four.

In his fifth issue, Johnson argues he was entitled to the lesser-included offense charge for misdemeanor family assault because he "continuously and strenuously challenged the State's purported evidence of a prior conviction it used to raise the misdemeanor assault charge to a felony assault charge." He also argues

that Erin's testimony "stands as evidence that Appellant did not impede [Rhonda]'s breathing, and under *Ortiz*[*v. State*, No. 04-18-00430-CR, 2019 Tex. App. LEXIS 8221 (Tex. App.—San Antonio Sep. 11, 2019, pet. granted) (mem. op., not designated for publication)], the trial court reversibly erred in denying Appellant the requested lesser included charge for misdemeanor family assault."

Assault family violence impeding breath or circulation is defined under section 22.01 as an assault requiring proof of commission: (1) against a family member, and (2) by means of "impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth[.]" *See* TEX. PENAL CODE ANN. § 22.01(b)(2)(B). Misdemeanor assault is a lesser-included offense because it is included within the proof necessary to establish assault family violence by impeding breath or circulation. *See Ritcherson*, 568 S.W.3d at 671; *see generally Marshall v. State*, 479 S.W.3d 840, 844 (Tex. Crim. App. 2016) (recognizing that simple assault may be enhanced to a third-degree felony if it is committed against a family member by impeding breathing or circulation).

Because we have already determined herein that the State provided legally sufficient evidence of Johnson's prior conviction, we need not address his argument in issue five that the misdemeanor charge cannot be raised to the felony charge absent legally sufficient evidence of the prior conviction. Applying the

two-part test, the first prong is satisfied because, as stated above, misdemeanor assault is a lesser-included offense. *See Ritcherson*, 568 S.W.3d at 671. Under the second prong, we must review the entirety of the record to determine if there exists "more than a scintilla" of affirmative evidence, regardless of whether controverted or credible, from which a rational jury could find the defendant guilty of only the lesser offense. *See Roy*, 509 S.W.3d at 317.

At trial and on appeal, the only evidence Johnson argued was "affirmative evidence" that showed Rhonda's breathing was not impeded was a portion of Erin's testimony. Johnson argues that, under Ortiz, the following testimony by Erin constituted affirmative evidence that Rhonda's breath was not impeded:

> [Erin:] I remember seeing [Rhonda] on the bed face down and [Johnson] on top of her.
>
> [Prosecutor:] Okay. And what was going on? What was [Johnson] doing?
>
> [Erin:] He was pulling her head into a pillow.
>
> . . . .
>
> [Prosecutor:] Okay. What was [Rhonda] doing?
>
> [Erin:] She was trying to get her head up because she was yelling to, like take [her son] out of the room.
>
> [Prosecutor:] Okay. Was she yelling for help?
>
> [Erin:] Yes, ma'am.
>
> . . . .

[Prosecutor:] Okay. So [Amy] started hitting [Johnson] with the blue dog bowl. And [Rhonda] was face down, and they were on the bed and [Johnson] was on top of her.

Did you see what happened next between [Johnson] and [Rhonda]?

[Erin:] [Johnson] got up afterwards, and he grabbed his keys and cigarettes and left.

In *Ortiz*, the defendant testified that he did not choke the victim, and in determining that the trial court erred in denying the requested instruction on the lesser included offense of simple assault, the Court of Appeals concluded that the jury could have found Ortiz caused bodily injury to the victim but did not choke her by believing portions of the testimony presented at trial while disbelieving other portions. *See* 2019 Tex. App. LEXIS 8221, at **9-10. *Ortiz* is distinguishable from the present case. Here, the record would need to contain some affirmative evidence to show that Rhonda's breathing was not impeded to entitle Johnson to the lesser-included instruction. *See Hall v. State*, 158 S.W.3d 470, 474 (Tex. Crim. App. 2005). Johnson relies solely on Erin's testimony for his argument, but Erin's testimony that Rhonda was yelling for help does not constitute "affirmative evidence" to support his lesser-included instruction. Erin testified that Johnson pulled Rhonda's head into a pillow and she saw Rhonda trying to get her head up, and Rhonda was yelling for help and Rhonda told them to take her son out of the room. Johnson argues that, because Erin did not testify

specifically that Johnson impeded Rhonda's breathing, Erin's testimony was evidence that Johnson did not impede Rhonda's breathing. We disagree. *See Roy*, 509 S.W.3d at 317; *Hall*, 158 S.W.3d at 474. Furthermore, Rhonda's and Amy's testimony that Johnson did not assault Rhonda at all also does not constitute "affirmative evidence" that Johnson was guilty of only the lesser-included offense of misdemeanor assault. *See Lofton v. State*, 45 S.W.3d 649, 652 (Tex. Crim. App. 2001) (testimony which otherwise shows that no offense occurred at all is not adequate to raise issue of a lesser-included offense). We conclude the record does not show "more than a scintilla" of affirmative evidence from which a rational jury could find the defendant guilty of only the lesser offense. *See Roy*, 509 S.W.3d at 317; *Hall*, 158 S.W.3d at 474; *Lofton*, 45 S.W.3d at 652. We overrule issue five.

Having overruled Johnson's appellate issues, we affirm the trial court's judgment.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on May 21, 2020
Opinion Delivered November 25, 2020
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.

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Bar No. 10592900
jaaws@peoplepc.com
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Jon A.Jaworski		jaaws@peoplepc.com	1/4/2021 11:22:51 AM	SENT